Filed 3/16/09 P. v. Prevedello CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER PREVEDELLO, Defendant and Appellant.	B199210 (Los Angeles County Super. Ct. No. PA054133)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Charles L. Peven, Judge. Reversed and remanded with instructions.

Carol S. Boyk, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Douglas L. Wilson, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Christopher Prevedello (defendant) was on parole when the police, acting on a residence address provided by defendant's parole officer, conducted a parole compliance check at a mobile home. During a search of the location, the police recovered a loaded handgun, a substantial amount of drugs, brass knuckles with a knife blade, and other items that suggested the drugs were possessed for sale. Defendant was arrested, charged with seven felony counts, and convicted on each.

On appeal, defendant contends that the trial court committed prejudicial error when it (i) denied his motion to disclose the identity of a confidential informant; (ii) denied his *Pitchess*[1] motion; (iii) denied his motion for a mistrial based on prosecutorial misconduct; (iv) denied his motion to exclude photographs of his tattoos; (v) excluded evidence of third-party culpability; (vi) convicted him on a greater and two lesser included offenses; and (vii) miscalculated his presentence custody credit.

We hold that the trial court properly denied defendant's motion for disclosure of the identity of the confidential informant. We further hold that the trial court properly denied defendant's motion for a mistrial based on misconduct, and did not abuse its discretion in admitting and excluding the evidence defendant now challenges on appeal. We agree, however, that the trial court erred when it denied defendant's *Pitchess* motion without conducting an in camera review of the police officer's personnel records. We also agree that Counts 2 and 3 are lesser offenses included within Count 4, requiring reversal and dismissal of those counts, and that defendant should be awarded three additional days of presentence custody credit. We therefore reverse the judgment and remand the matter with instructions.

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1 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

FACTUAL BACKGROUND

A. Prosecution's Case

Micah Sims supervised defendant as his parole agent beginning in September 2005. He was required to meet with defendant twice a month, once at defendant's residence and once at the Van Nuys parole office. In September 2005, Agent Sims met with defendant at his father's house on Lopez Street. He met again with defendant in November 2005, at which time defendant advised Agent Sims that he planned on moving in with his girlfriend in December 2005.

On December 16, 2005, defendant met with Agent Sims and informed him that he had moved to 4201 Topanga Canyon Boulevard, Unit 27 (the mobile home). The unit was in a mobile home park. Defendant informed Agent Sims that he had moved in with his girlfriend and his small child. Defendant confirmed that "he had actually moved [and] . . . was physically residing at his new location." That day, defendant filled out a monthly report form in his own handwriting on which he indicated that his "current address" was the mobile home address. He further indicated on that form he was living with his girlfriend and small child. Defendant signed and dated the monthly report form. To the left of defendant's signature was the statement, "[The] [i]nformation which I have submitted is true to the best of my knowledge and belief."

Agent Sims had a good working relationship with defendant. It was not adversarial, and he did not have problems with defendant or have any animosity toward or bias against him.

Between September and December 2005, defendant did not have any negative urine analyses.[2] Agent Sims was aware during that period that defendant was taking

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[2] Defendant submitted to and passed four drug tests while under Agent Sims's supervision.

prescription vicodin. He was also aware defendant had a hernia. Other than vicodin, Agent Sims had no information that defendant was taking illegal drugs in 2005.

According to Agent Sims, a parolee is required to provide advance notice of a change of address. Agent Sims had met with defendant at the Van Nuys parole office on November 17, 2005. He did not recall whether he discussed with defendant the change of address issue. Between November 17 and December 16, 2005, Agent Sims did not meet with defendant. According to Agent Sims, during that period, defendant's legal residence was his father's house.

Agent Sims did not visit the mobile home location after December 16, 2005, to verify whether defendant resided there. He did not attempt to visit the mobile home because he had information that defendant was a suspect in a string of robberies and because he was notified of defendant's December 20, 2005, arrest. It was not necessary for Agent Sims to be present when a police officer conducted a parole search of defendant.

On December 20, 2005, Los Angeles Police Officer Anthony Daniel was "assigned to [the] plain clothes section of Mission detective section." He had been assigned that day to a plain clothes detail that was to conduct a parole compliance check at the mobile home. He and various other officers went to that location and conducted surveillance. He saw the defendant exit the mobile home. He also saw a woman, Sarah Mulligan, exit the mobile home. He did not see anyone else go into or come out of the mobile home.

Once defendant and Mulligan reentered the mobile home, Officer Daniel and his fellow officers approached the location and knocked on the door next to the carport. Mulligan answered the door, and then defendant came out of the mobile home. Officer Daniel and the other officers entered the mobile home and began to conduct a search.

The mobile home had two bedrooms, one of which contained children's clothing and toys. The other, larger or master bedroom had two closets; one contained women's clothing, and the other contained men's clothing. As Officer Daniel searched the closet containing the men's clothing, he noticed a black bag with the markings "U.S. Army an

army of one." From inside the bag, Officer Daniel recovered a handgun in a holster. While conducting a chambers check on the gun, Officer Daniel found a round in the chamber and then released the magazine which contained an additional 11 rounds. In addition to the loaded gun, Officer Daniel also found a ski mask and a can of "WD-40" lubricant in the black bag.

Next to the closet in the master bedroom on a dresser, Officer Daniel found pills, narcotics, and a black box. The dresser contained men's clothing. Twenty-five of the pills were in a vial and others were recovered from the dresser.

In the laundry area, Officer Daniel found a tool box that contained a camouflaged bag that, in turn, contained narcotics and hundreds of red and blue baggies. Also in the laundry area, Officer Daniel found two battery-powered digital scales. In the same area, he recovered methamphetamine, glass vials that could be used to store narcotics, and syringes. He recovered additional pills in a brown vial from the same location.

Officer Daniel did not see defendant in possession of any of the items recovered from the mobile home during the parole search. He had no idea if anyone else entered or left the mobile home prior to his arrival to conduct the surveillance and parole search.

The items of male clothing that Officer Daniel observed in the closet at the mobile home were photographed but left at the location. Officer Daniel did not know if any of the items he recovered from the mobile home were checked for fingerprints.

The black bag Officer Daniel recovered did not have anything on it identifying it as defendant's, such as his name. Defendant did not attempt to flee when Officer Daniel and his fellow officers contacted him. During the search, none of the officers asked defendant to try on the men's clothing in the closet to determine if they fit him. Defendant did not have any suspicious or illegal items on his person when he was patted down.

In December 2005, Los Angeles Police Officer Richard Jaramillo was assigned to the parole apprehension detail at the Mission Division. On December 20, 2005, he responded to the mobile home with other officers. He participated in the search of that location, which had two bedrooms. Other than his fellow officers, Officer Jaramillo

observed two adults at the location, one of whom was defendant. In the master bedroom of the mobile home, he saw female clothing in one closet and male clothing in the other.

Once the officers made contact with the occupants of the mobile home on December 20, 2005, they entered the location and found a camouflaged bag on the hutch in the living room that contained a substance that Officer Jaramillo believed to be methamphetamine. There were two baggies and two vials containing the substance.

Another officer told Officer Jaramillo to come to a shed at the back of the location and look at certain items. There, he saw a black ski mask and a set of metal knuckles with a knife blade attached. Officer Jaramillo also found ammunition in the shed. In total, 34 rounds of live .380 caliber ammunition was recovered from the mobile home. Along with the ammunition in the shed, he recovered two magazines that fit into the handgun that was recovered from the mobile home. A gray tool box recovered from the shed contained a large amount of gun cleaning material. The shed contained hundreds of tools and two tool boxes, one of which had a Confederate flag sticker on it.

Officer Jaramillo believed that the male clothing in the master bedroom closet would fit defendant. The officers did not find anything of evidentiary value in the closet containing female clothing. The officers found a metal box in the closet with the male clothing that contained defendant's Department of Corrections (DOC) identification card. On the bed in the master bedroom, the officers recovered a Confederate flag.

Inside the closet in the master bedroom, Officer Jaramillo located a bag that contained "paperwork depicting World War II German-type paraphernalia" and documents "depicting white supremacy type of issues." There was also a photograph of defendant in the bag depicting a tattoo on his arm. In addition, there were photographs depicting the tattoos on defendant's back and chest. Inside the mobile home, Officer Jaramillo recovered two "tattoo guns," needles, paint, and plastic gloves, all common tools for tattooing.

Officer Jaramillo interviewed defendant at the Mission station after he arrested him and advised him of his *Miranda*[3] rights, which defendant waived. Defendant told Officer Jaramillo that he lived in the mobile home and that the clothes in the closet were his. Defendant knew he was on parole and he told Officer Jaramillo that he knew the officers would find narcotics and ammunition inside the mobile home and shed. But defendant stated that he did not know anything about the handgun recovered by the officers. Defendant explained to Officer Jaramillo that he bought the ski mask at Wal-Mart to use when it was cold.

Officer Jaramillo did not see defendant in possession of any of the items that were recovered from the mobile home on December 20, 2005, and defendant did not have a weapon or narcotics on his person when he was searched. During the search, defendant did not appear to Officer Jaramillo to be under the influence of drugs.

Officer Jaramillo did not tape record his interview with defendant, and defendant did not sign or initial Officer Jaramillo's written summary of that interview. Defendant was, however, cooperative during the interview.

The handgun and some of the other items recovered from the mobile home were sent to the crime lab for fingerprint analysis, but none of the items had defendant's fingerprints. Officer Jaramillo did not find any information inside the black bag with the handgun identifying defendant.

Because of the contraband that Officer Jaramillo and his fellow officers found at the mobile home, they wanted to photograph it as it was prior to recovering it, but the camera they brought with them was inoperable. They called for another camera, but it never arrived. As a result, they returned to the mobile home two days later, with a search warrant, and took photographs of various items.

Los Angeles Police Officer Ruben Arellano worked in an undercover capacity for the Mission area narcotics squad. He had qualified on approximately 20 occasions to

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3 *Miranda v. Arizona* (1966) 384 U.S. 436.

testify as an expert in the field of "controlled substances, specifically their uses, methods of ingestion, paraphernalia, possession, [and] possession for sales." Based on the items recovered from the mobile home and, in particular, the amount of methamphetamine recovered, the types of other narcotics recovered, the number of baggies and vials, the three scales, the gun, and that neither defendant nor Mulligan appeared under the influence of drugs on December 20, 2005, Officer Arellano opined that the drugs were possessed for sale, not personal use. Moreover, based solely on the amount of methamphetamine recovered, Officer Arellano opined that it was possessed for sale.

B. Defense Case

According to defendant's father, John Prevedello, in November and December 2005, defendant was living with him at his residence on Lopez Street in Woodland Hills. Defendant's father could not remember a night during the November to December 2005 time frame when defendant did not stay at the residence of defendant's father. The father was "absolutely positive" that defendant was living with him on December 20, 2005. He saw defendant downstairs on the morning of December 20 and recalled that defendant left the house that day sometime before noon.

The father was aware that Sarah Mulligan was the mother of defendant's child and that he had been to a mobile home somewhere off Topanga Canyon Road. Prior to December 20, 2005, the father had seen Mulligan taking drugs and was concerned about defendant's baby.

Dale Barco lived next door to John Prevedello's residence. In December 2005, Barco saw defendant regularly at the house of defendant's father. Barco saw defendant "morning, day, and night" working in the father's yard. He saw defendant at the father's house on the morning defendant was arrested.

Janet Mulligan, Sarah Mulligan's younger sister, helped her sister move from their parents' home in Woodland Hills to the mobile home. She recalled moving men's clothing from her parents' house to the mobile home, but did know to whom they belonged.

Janet Mulligan's sister, Sarah, was the mother of defendant's baby, and the sisters' parents purchased the mobile home so Sarah could live with the baby. Janet Mulligan knew her sister was a drug addict and had seen her "do a lot of drugs at the [mobile] home." The drug use concerned their family.

Janet Mulligan had seen defendant visit the mobile home after her sister and the baby moved in, but she had not seen him sleep overnight there. According to Janet Mulligan, she knew Dave Cipolla and that her sister was intimately involved with him. Cipolla was a "skinhead" who wore black boots "up to his knees" and displayed an "attitude that [he was] better than . . . certain races."

In December 2005, Janet Mulligan observed Cipolla at her sister's mobile home "over 15 times." She also saw defendant at that location during December 2005, but she never saw Cipolla and defendant at her sister's mobile home at the same time.

Janet Mulligan had seen Cipolla sleep overnight at her sister's mobile home, but did not know if there was a gun at that location. She saw Cipolla carrying a black bag with "U.S. Army" on it while he was staying at her sister's mobile home.

Janet Mulligan observed defendant at her sister's mobile home approximately five times in December 2005. He was there to visit with his child, but did not sleep there or have clothes there. She knew defendant subscribed to the "skinhead mentality" like Cipolla, but not to the same extent.

Janet Mulligan also abused drugs at her sister's mobile home. She used methamphetamine "pretty heavily." She had seen other people at her sister's home using methamphetamine. She had seen Cipolla in possession of hundreds of small "ziplock baggies." Janet Mulligan believed her sister's relationship with Cipolla was bad for her sister and the baby.

Defendant's sister, Angelina Prevedello, lived four houses away from their father's residence. In December 2005, she understood that defendant was living with their father. She walked to her father's house every day during that time and saw defendant living at that location with their father. On the morning of December 20, 2005,

she saw defendant working in her father's yard on the sprinkler system. Sometime after she saw defendant at that location, he left.

Angelina Prevedello knew Sarah Mulligan, knew Mulligan was the mother of defendant's child, and had visited Mulligan's mobile home "quite a few" times in December 2005. When she visited, she saw Cipolla, "a bald guy, Nazi low rider," who would "answer the door, go back sitting down, tweaking[4] on his tattoo guns." Cipolla "was always ranting and raving about his Nazi low-rider homeboys . . . ." Angelina Prevedello was also aware that defendant had Nazi tattoos and had beliefs similar to Cipolla at that time.

According to Angelina Prevedello, Cipolla "would always have a gun with him, waiving it around, talking about his gang affiliations [and going] in and out of the bedroom, puffing away . . . ." The gun Angelina Prevedello saw in Cipolla's possession was a small, black handgun, "possibl[y] . . . a .38, .380, along those lines." The handgun recovered from Sarah Mulligan's mobile home looked familiar to Angelina Prevedello. It was similar to the one she had seen Cipolla carrying.

Angelina Prevedello observed Sarah Mulligan at the mobile home using drugs with other persons. She was concerned about the well-being of defendant's baby because the child was living in an environment with drugs and guns. In December 2005, she visited the mobile home three or four times a week to check on the baby. She would take defendant's baby home with her for protection. But she always returned the baby to the same environment. She saw defendant at the mobile home "a couple of times" in December 2005 also checking on the baby.

Angelina Prevedello believed having Cipolla around defendant's baby was a "horrific situation," but she never called the police or social services. Defendant knew Mulligan and Cipolla were abusing drugs at the mobile home, and Angelina told defendant that Cipolla had guns in the home.

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[4] According to Angelina Prevedello, "tweaking" meant "doing speed, heroine."

Leslie Edwards was Angelina Prevedello's roommate. They lived near the residence of defendant's father's. In December 2005, she believed defendant was living with his father.

According to defendant, who testified on his own behalf, he was living in his father's house on Lopez Street when he filled out the monthly parole statement on December 16, 2005. Between September and November 2005, defendant had three or four drug tests that he passed, if not more. He was not using methamphetamines in December 2005, nor was he taking morphine pills or oxycodone. Prior to moving to the mobile home, Sarah Mulligan lived at her parents' house. Defendant lived there with her "for quite a while" and had clothing at that location. Defendant helped her move from her parents' house to the mobile home.

In November 2005, he informed his parole officer that he was planning on moving in with the mother of his child because he wanted to be close to his baby and work things out with the child's mother. He informed his parole agent that the child's mother was using drugs around his child. He knew moving into that environment could be a parole issue. Defendant understood that if he was going to change his address, he was required to give his parole agent 30-days advance notice.

On December 16, 2005, defendant inserted the mobile home address on his monthly parole report because he understood that, before he could move, his parole agent would have to visit and approve the new location. He understood that once his parole agent made the visit and approved the move, the mobile home address would be considered his new address. He did not tell his parole agent on December 16 that he had already moved in with Sarah Mulligan. He informed his parole agent that he would be moving into Sarah Mulligan's mobile home that weekend. Specifically, he told the agent that he was in the process of moving, beginning that night, which was a Friday. But he and Sarah Mulligan had an argument that night, so he went and visited his girlfriend. He returned to his father's house on Sunday, December 18.

In the November through December 2005 time frame, defendant had seen Cipolla at the mobile home. He saw Cipolla at the mobile home with drugs. According to

defendant, Cipolla was a skinhead. Defendant had Nazi tattoos on his back because, at one time, he also believed in the philosophies of Nazi Germany.

In December 2005, defendant had been at the mobile home about five times to babysit his child while Sarah Mulligan was at school. Every time he visited, he saw people using drugs. He did not like people using drugs around his one and a half year old child, and he would get angry, yell at the people, and tell them to leave. Defendant had seen contraband at the mobile home before and was aware that he could not possess items such as drugs, ammunition, scales, baggies, or metal knuckles. He watched his child at that location for four or five hours on Monday, December 19, 2005.

On December 20, 2005, defendant awoke at his father's house and left around 11:30 a.m. Defendant went to the mobile home and saw Cipolla, whom he thought was his friend, and it was obvious that Cipolla and Sarah Mulligan were in a relationship. Defendant became angry, pushed Cipolla, and ran after him, causing Cipolla to leave.

On December 20, 2005, the police officers told defendant that they had come to the mobile home to conduct a parole search. Defendant told Officer Jaramillo that the mobile home was not his residence and that if they wanted to search his residence, they should go to his father's house. He did not tell the officers that he used speed, that they were going to find drugs in his house, that he had knives in the shed out back, that he had ammunition and magazines in the residence, that he had items of clothing in the closet, or that he used ski masks when it was cold outside.

Defendant claimed the weapon that was recovered from the mobile home was not his, nor were the brass knuckles that were recovered. He also claimed the black bag with the "U.S. Army" marking that the officers recovered was not his. He admitted the DOC identification card found at the mobile home was his, but he believed he had left that card "along with some other identification stuff" at Sarah Mulligan's parents' house. The photograph of defendant and his baby that the officers recovered from the mobile home was taken at the baby's first birthday party at Sarah Mulligan's parents' house.

Defendant admitted that he was convicted of receiving stolen property in 1995, of being a felon in possession of body armor in 2002, and of a parole violation in 2005. He was reparoled in June 2005.

Defendant had not used methamphetamines since he was paroled in 2003. He saw Sarah Mulligan using methamphetamines close to 100 times. Defendant could not explain why he allowed his child to return to Sarah Mulligan's home while she was actively using drugs.

On December 20, 2005, he had conversations with Officer Jaramillo at the mobile home and then at the police station. Defendant never discussed any of the property discovered at the mobile home with Officer Jaramillo.

Sarah Mulligan testified and confirmed that she was the mother of defendant's child. Prior to moving to her mobile home in December 2005, Mulligan lived with defendant at her parents' house. When she moved to her mobile home, she moved "[her] stuff, [her] kid's stuff, [and] some of [defendant's] stuff that was in [her] parents' house."

At the time Mulligan moved to her mobile home in December 2005, she was using drugs, "heroine, morphine, . . . any kind of . . . opiate or speed." She was in a relationship with Cipolla at the time, but did not want defendant to know about it. Cipolla stayed overnight at Mulligan's mobile home and used drugs there.

In December 2005, defendant babysat for Mulligan "a lot because [she] had work and school." But defendant never slept overnight. She understood that defendant was living with his father at that time. During December 2005, Mulligan was trying to get help for her narcotics addiction. She started taking methadone.

Mulligan saw Cipolla with the handgun "a lot when he was up to no good." Mulligan had seen Cipolla with the black bag with U.S. Army markings on it. He walked around with that bag all the time. Mulligan had seen Cipolla with a handgun in December 2005. Defendant did not know about the gun. Only Mulligan knew Cipolla had the gun. Cipolla was at the mobile home as often as defendant, but at different times. Defendant was only there during the day.

On December 20, 2005, the police came to the mobile home, she answered the door, and she allowed them in. Mulligan may have spoken to Officer Jaramillo and may have told the police that some of the items in the mobile home belonged to defendant. She was nervous and afraid her baby would be taken away. She just panicked.

The morphine tablets that the police recovered belonged to Mulligan, as did the oxycodone pills that were recovered. The tattoo equipment recovered by the police belonged to Cipolla. The methamphetamine recovered by the police was also Cipolla's.

Mulligan did not recall telling Officer Jaramillo that the drugs found in her mobile home were defendant's. Nor did she recall telling him that defendant "tweaks and puts stuff all around the house." Mulligan never told the police that defendant went out to the shed to get "high." And she never told the police that defendant would place drugs and narcotics on the dresser or in drawers. She did not tell the police that she knew defendant was using drugs and did not tell them that he had moved in with her three weeks earlier. She only told the police that she had moved in three weeks earlier.

Mulligan told police that some of the clothing in the mobile home was defendant's. She had placed some of defendant's clothing that she brought from her parents' house in the closet, but Cipolla's clothes were also there, as well as the clothes of another male.

PROCEDURAL BACKGROUND

In an amended information, the Los Angeles County District Attorney charged defendant in Count 1 with possession for sale of a controlled substance, methamphetamine, in violation of Health and Safety Code section 11378—a felony; in Count 2 with possession of a controlled substance, morphine, in violation of Health and Safety Code section 11350, subdivision (a)—a felony; in Count 3 with possession of a controlled substance, oxycodone, in violation of Health and Safety Code section 11350, subdivision (a)—a felony; in Count 4 with possession of a controlled substance, morphine and oxycodone, with a firearm in violation of Health and Safety Code section

11370.1, subdivision (a)—a felony; in Count 5 with possession of a firearm by a felon in violation of Penal Code section 12021, subdivision (a)(1)[5]—a felony; in Count 6 with possession of ammunition by a felon in violation of section 12316, subdivision (b)(1)—a felony; and in Count 7 with possession of a deadly weapon, metal knuckles, in violation of section 12020, subdivision (a)(1)—a felony. The District Attorney alleged as to Count 1 that, in the commission of that offense, defendant was personally armed with a firearm within the meaning of section 12022, subdivision (c). The District Attorney further alleged, as to all counts, that defendant had been convicted of four felonies within the meaning of section 1203, subdivision (e)(4); that defendant had suffered four prior convictions resulting in prison terms within the meaning of section 667.5, subdivision (b); and that defendant had suffered one prior conviction of a serious or violent felony within the meaning of sections 1170.2, subdivisions (a) through (d) and 667, subdivisions (b) through (i) (the Three Strikes Law).

Defendant was convicted after jury trial on all seven counts. The trial court sentenced defendant on Count 1 to the middle term of two years, doubled to four years pursuant to the Three Strikes Law, plus an additional four years pursuant to section 12022, subdivision (c), for a total of eight years; on Count 2 to one-third the middle term of two years, or eight months, doubled to 16 months to run consecutively with Count 1; on Count 3 to one-third of the middle term of two years, or eight months, doubled to 16 months to run consecutively with Count 2; on Count 4 to the middle term of two years,[6] doubled to four years with execution of that sentence stayed pursuant to section 654; on

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[5] All further statutory references are to the Penal Code unless otherwise indicated.

[6] The conviction on Count 4 was for a violation of Health and Safety Code section 11370.1, subdivision (a). As discussed below, the middle term sentence for a violation of that section is three years, not two years. In pertinent part, section 11370.1, subdivision (a) provides: "Notwithstanding Section 11350 or 11377 or any other provision of law, every person who unlawfully possesses any amount of a substance containing cocaine base, . . . while armed with a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years."

Count 5 to the middle term of two years, doubled to four years with execution of that sentence stayed pursuant to section 654; on Count 6 to one-third the middle term of two years, or eight months, doubled to 16 months to run consecutively with Count 3; on Count 7 to one-third the middle term of two years, or eight months, doubled to 16 months to run consecutively with Count 6; and, pursuant to section 667.5, subdivision (b), to an additional consecutive sentence of two years. The aggregate sentence was 15 years four months.

DISCUSSION

A. Disclosure of the Identity of Confidential Informant

The standard of review for defendant's challenge to the trial court's denial of his motion for disclosure of the identity of a confidential informant appears to be unsettled. "The standard of review applicable to the [denial of a motion for disclosure of an informant's identity] is not settled. (Compare, e.g., *People* v. *Otte* (1989) 214 Cal.App.3d 1522,1535-1536 [263 Cal.Rptr. 393] [suggesting review de novo] with *People* v. *Alderrou* (1987) 191 Cal.App.3d 1074, 1078, 1080 [236 Cal.Rptr. 740] [assuming review for abuse of discretion]; see *People* v. *Louis* (1986) 42 Cal.3d 969, 985-987 [232 Cal.Rptr. 110, 728 P.2d 180] [dealing generally with standards of review].)" (*People v. Gordon* (1990) 50 Cal.3d 1223, 1245-46.) For purposes of our review of this challenge, we will assume that the more rigorous de novo standard of review applies because, as discussed below, the trial court's denial of defendant's motion for disclosure of the identity of the confidential informant was proper under any standard.

Defendant contends that that the trial court erred when it denied his motion for disclosure of the identity of the confidential informant. According to defendant, a confidential informant provided the police with information that defendant resided at the mobile home and that the home contained contraband. Defendant argues that, as a result, the informant may have had information that would have exonerated defendant, such as the true identity of the owner of the handgun and drugs.

This issue is governed by the privilege against the disclosure of the identity of confidential informants set forth in Evidence Code sections 1041[7] and the procedure for challenging the assertion of that privilege set forth in Evidence Code section 1042.[8] It is

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[7] Section 1041 provides in pertinent part: "(a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or of a public entity in this state, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and: [¶] (1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or [¶] (2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered."

[8] The procedure for challenging an assertion of privilege set forth in Evidence Code section 1041 is detailed in Evidence Code section 1042, subdivision (d): "When, in any such criminal proceeding, a party demands disclosure of the identity of the informant on the ground the informant is a material witness on the issue of guilt, the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure. Such hearing shall be conducted outside the presence of the jury, if any. During the hearing, if the privilege provided for in Section 1041 is claimed by a person authorized to do so or if a person who is authorized to claim such privilege refuses to answer any question on the ground that the answer would tend to disclose the identity of the informant, the prosecuting attorney may request that the court hold an in camera hearing. If such a request is made, the court shall hold such a hearing outside the presence of the defendant and his counsel. At the in camera hearing, the prosecution may offer evidence which would tend to disclose or which discloses the identity of the informant to aid the court in its determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial. A reporter shall be present at the in camera hearing. Any transcription of the proceedings at the in camera hearing, as well as any physical evidence presented at the hearing, shall be ordered sealed by the court, and only a court may have access to its contents. The court shall not order disclosure, nor strike the testimony of the witness who invokes the privilege, nor dismiss the criminal proceeding, if the party offering the witness refuses to disclose the identity of the informant, unless, based upon the evidence presented at the hearing held in the presence of the defendant and his counsel and the evidence presented at the in camera hearing, the

well established that a defendant seeking disclosure of the identity of a confidential informant under Evidence Code section 1042 has the burden of producing evidence. "[T]he prosecution must disclose the name of an informant who is a material witness in a criminal case or suffer dismissal of the charges against the defendant. (*Eleazer v. Superior Court* (1970) 1 Cal.3d 847, 851 [83 Cal.Rptr. 586, 464 P.2d 42].) An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant. (*People v. Borunda* (1974) 11 Cal.3d 523, 527 [113 Cal.Rptr. 825, 522 P.2d 1].) The defendant bears the burden of adducing ""'some evidence'"" on this score. (*People v. Gordon* [(1990)] 50 Cal.3d [1223,] 1246, quoting *People v. Hardeman* (1982) 137 Cal.App.3d 823, 828 [187 Cal.Rptr. 296].)" (*People v. Lawley* (2002) 27 Cal.4th 102, 159-160.)

The trial court held a hearing on defendant's motion as required by Evidence Code section 1042. But the only evidence submitted by defendant on that motion was the declaration of his trial counsel. No other witnesses were called to testify at the hearing, and neither party requested the trial court to hold an in camera hearing as permitted, but not required, by section 1042.[9] After reviewing that declaration, the trial court concluded, "As the motion sits right now, I think the People's point is well-taken. There's just nothing in the motion to suggest that the informant meets that standard that the D.A. already articulated once or twice . . . in his comments. The law is well settled. It's a factual situation really, but there are no facts contained in the declaration . . . that would suggest the informant is material on the issue of guilt. . . . I think the ruling you have, as I indicated to counsel, from what I have before me, the motion is denied. If

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court concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial."

9 Evidence Code section 1042, subdivision (d), provides that the prosecutor may request an in camera hearing.

[defense counsel has] something else that [he] wants to present to us, I would be happy to take a look at it in the future."

Based on our de novo review of the declaration of defendant's trial counsel in support of the motion, we agree with the trial court. There is nothing in that declaration to suggest that there was a reasonable probability that the informant could give evidence on the issue of guilt that might exonerate defendant. Defendant's burden was to produce "some evidence," but the declaration of his trial counsel contains no evidence whatsoever. Some of the statements in the declaration were made on information and belief, and each is lacking in foundation. Defendant's counsel did not claim to have personal knowledge of the matters set forth in the declaration, and most, if not all, of the matters stated in it are impermissible conclusions or opinions in any event.

Moreover, in opposition to the motion, the prosecution submitted evidence showing that defendant was on parole and had confirmed in writing that he had changed his address to the mobile home five days prior to the parole compliance search on December 20, 2005. That evidence directly contradicted the unsupported statement by defendant's trial counsel in the declaration that the "police had no information , at least on the day of [defendant's] arrest, that [defendant] lived at the . . . [mobile home] . . . ." Based on the record before us, we conclude that defendant failed to meet his burden of producing some evidence that the confidential informant could provide evidence on the issue of guilt that might exonerate him.

B. *Pitchess* Motion

We review the trial court's ruling on the *Pitchess* motion for abuse of discretion. (*People v. Prince* (2007) 40 Cal.4th 1179, 1286; see also *People v. Hughes* (2002) 27 Cal.4th 287, 330 [A trial court's ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion].) Not complying with our Supreme Court's requirements in connection with a *Pitchess* motion is considered an abuse of discretion. (See *People v. Johnson* (2004) 118 Cal.App.4th 292; *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39.)

Defendant contends he presented a sufficient factual basis in support of his *Pitchess* motion to warrant an in camera inspection of Officer Jaramillo's personnel files to determine if those records contained information useful to his misconduct defense. According to defendant, the declaration of his trial counsel submitted in support of his *Pitchess* motion expressly denied that defendant made the admissions attributed to him by Officer Jaramillo in his arrest report, thereby establishing a plausible factual scenario of police misconduct on the part of Officer Jaramillo.

In support of this challenge, defendant cites, inter alia, to the Supreme Court's decision in *Warrick v. Superior Court* (2005) 35 Cal.4th 1011 (*Warrick*). In *Warrick*, the police report indicated that the three arresting officers were on patrol in a marked vehicle in an area known for narcotics activities when they observed the defendant looking into a clear plastic baggie in his hand. (*Id.* at p. 1016.) The baggie contained "off-white solids." (*Ibid.*) As the officers exited their vehicle, the defendant fled, discarding numerous off-white "lumps" resembling rock cocaine. (*Ibid.*) One of the officers recovered 42 lumps from the ground and the other two officers detained the defendant after a short pursuit. (*Ibid.*) The defendant had an empty baggie in his hand and $2.75 in cash in his pockets. (*Ibid.*) Defendant was arrested and charged, inter alia, with possession of cocaine base for sale. (*Id.* at pp. 1016-1017.)

Prior to trial, the defendant filed a *Pitchess* motion under Evidence Code section 1043 for disclosure of any previous citizen complaints against the three arresting officers. (*Warrick, supra,* 35 Cal.4th at p. 1017.) The defendant supported his motion with a declaration from his counsel setting forth the following facts: "When the three officers got out of the patrol car, defendant, who feared an arrest on an outstanding parole warrant, started to run away, but within moments the officers caught up with him. Meanwhile, there were 'people pushing and kicking and fighting with each other' as they collected from the ground objects later determined to be rock cocaine. After two officers retrieved some of the rocks, an officer told defendant, '"You must have thrown this."' Defendant denied possessing or discarding any rock cocaine. He said he was in the area to buy cocaine from a seller who was present there. Defense counsel suggested that the

officers, not knowing who had discarded the cocaine, falsely claimed to have seen defendant, who was running away, do so." (*Id.* at p. 1017.)

The trial court denied the defendant's motion, including his request for an in camera review of the requested records, concluding that the defendant had failed to establish good cause. (*Warrick, supra,* 35 Cal.4th at p. 1018.) After the Court of Appeal denied the defendant's petition for writ of mandate, the Supreme Court granted review. (*Ibid.*)

In reversing the Court of Appeal's order denying the defendant's petition, the Supreme Court in *Warrick, supra,* 35 Cal.4th 1101, explained the origins of the so-called *Pitchess* motion. "This court's 1974 decision in *Pitchess, supra,* 11 Cal.3d at pages 536 to 537, established that a criminal defendant could 'compel discovery' of certain relevant information in the personnel files of police officers by making 'general allegations which establish some cause for discovery' of that information and by showing how it would support a defense to the charge against him. [¶] In 1978, the California Legislature codified the holding of *Pitchess* by enacting Penal Code sections 832.7 and 832.8, as well as Evidence Code sections 1043 through 1045. (Added by Stats. 1978, ch. 630, §§ 1–3 & 5–6, pp. 2082–2083; see *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 9 [124 Cal.Rptr.2d 202, 52 P.3d 129].)" (*Warrick, supra,* 35 Cal.4th at pp. 1018-1019.)

The court in *Warrick, supra,* 35 Cal.4th 1101, then described the showing required to justify production of an officer's personnel records. "To initiate discovery, the defendant must file a motion supported by affidavits showing 'good cause for the discovery,' first by demonstrating the materiality of the information to the pending litigation, and second by 'stating upon reasonable belief' that the police agency has the records or information at issue. ([Evidence Code,] § 1043, subd. (b)(3).) This two-part showing of good cause is a '*relatively low threshold for discovery*.' [Citation.] [¶] If the trial court finds good cause for the discovery, it reviews the pertinent documents in chambers and discloses only that information falling within the statutorily defined standards of relevance. [Citations.]" (*Warrick, supra,* 35 Cal.4th at p. 1019, italics added.)

According to the court in *Warrick, supra,* 35 Cal.4th 1011, the declaration of defense counsel in support of a *Pitchess* motion must propose a defense to the pending charge that is supported by a plausible factual scenario of police misconduct. "To show good cause as required by section 1043, defense counsel's declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges. . . . [¶] Counsel's affidavit must also describe a factual scenario supporting the claimed officer misconduct. That factual scenario, depending on the circumstances of the case, may consist of *a denial of the facts asserted* in the police report. [¶] . . . [¶] [A] plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges. A defendant must also show how the information sought could lead to or be evidence potentially admissible at trial. Such a showing 'put[s] the court on notice' that the specified officer misconduct 'will likely be an issue at trial.' [Citation.] Once that burden is met, the defendant has shown materiality under section 1043." (*Id*. at pp. 1024, 1025, 1026, italics added.)

Applying these standards to counsel's declaration in support of the defendant's *Pitchess* motion, the court in *Warrick, supra,* 35 Cal.4th 1011, concluded, "[D]efendant's version of events is plausible given the factual scenario described in defense counsel's declaration. The declaration asserted that the officers mistook defendant for the person who actually discarded the cocaine, and falsely accused him of having done so. The scenario described in defense counsel's declaration is internally consistent; it conflicts with the police report only in denying that defendant possessed any cocaine and that he was the one who discarded the rocks of cocaine found on the ground. Those denials form the basis of a defense to the charge of possessing cocaine for sale. Thus, defendant has outlined a defense raising the issue of the practice of the arresting officers to make false arrests, plant evidence, commit perjury, and falsify police reports or probable cause." (*Id.* at p. 1027.) Accordingly, the court in *Warrick* held that the defendant had "established good cause for *Pitchess* discovery, entitling him to the trial court's in-chambers review of

the arresting officers' personnel records relating to making false arrests, planting evidence, fabricating police reports or probable cause, and committing perjury." (*Ibid.*)

In the instant case, defendant asserted the following facts on information and belief in the declaration of his trial counsel. "7. Upon information and belief, the defense refutes that [defendant] gave any statement voluntarily and knowingly to [Officers Jaramillo and Daniel]. [*Defendant*] *refutes that he gave the statement as illustrated in the attached exhibit.* [*See* Exhibit '*A*']. Further, [defendant] claims that [Officers Jaramillo and Daniel] have a personal hostility and personal bias against him. [¶] 8. Another witness, Ms. Janet Mulligan, whom is referenced in the police report (see p. 2/6 of arrest report), claims that her statements are also inaccurate. Further, [she claims] that what is specifically entailed in the police report about her is not what she told the police on the date of December 20, 2005." (Italics added.) The Exhibit "A" to which the declaration refers is apparently a copy of a page from Officer Jaramillo's arrest report in which he recorded statements made to him by defendant, including admissions that defendant used speed, that defendant knew the officers would find drugs, knives, and ammunition in the mobile home and shed, and that all the items in the closet of the mobile home, including the clothes, were defendant's.

At the hearing on defendant's *Pitchess* motion, the trial court reviewed the declaration of defendant's counsel and concluded as follows: "My tentative ruling, as I indicated to counsel off the record, is I was going to deny the *Pitchess* motion and deny the request for an in camera hearing on the grounds that the declaration in support of the motion is not sufficient to get us to that point. There are several cases. Obviously I'll point to *Warrick* and *Thompson* . . . . But I don't think the information contained on page 6 of the declaration—page 6 of the motion, I should say, which is the pertinent parts, paragraph [sic] seven and eight, rises to the level . . . [of] a specific factual scenario. [¶] Essentially the defendant indicates on information and belief that he refutes the defendant gave any statement voluntarily and knowingly. The statement itself apparently is not refuted. It's just a question of whether it was voluntary and knowing. That doesn't seem to rise to that level. There's no specific factual scenario from the

defendant himself that would give the court an indication of why I should have an in camera hearing on the mater [sic]. [¶] . . . [¶] Like I said, I'm just ruling on what's before me. The declaration itself simply says he refutes he gave the statement voluntarily and knowingly. It doesn't say refutes the idea he gave the statement. [¶] . . . But in any event, the *Pitchess* motion will be denied."

From the trial court's comments at the hearing on the *Pitchess* motion, it appears the trial court concluded that defendant did not deny ever making the statements to Officer Jaramillo, but only denied making those statements knowingly and voluntarily. To the extent that was the basis of the trial court's ruling, it was erroneous. The declaration plainly denies that defendant made the statements contained in Exhibit "A," the arrest report, and that report contains admissions made by defendant to Officer Jaramillo. By his counsel's declaration denying that he made those admissions, defendant established a plausible factual scenario of police misconduct by suggesting that Officer Jaramillo fabricated the statements attributed to defendant. Given that factual scenario, the trial court was under an affirmative duty to conduct an in camera inspection of Officer Jaramillo's personnel records[10] to determine if they contain evidence relevant to defendant's misconduct defense. The trial court's failure to conduct such an inspection warrants conditional reversal of the judgment to allow the trial court to conduct the required in-chambers inspection.[11]

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[10] Although defendant's motion sought records for both Officer Jaramillo and Officer Daniel, there is nothing in the declaration of defendant's trial counsel establishing a plausible factual scenario of misconduct as to Officer Daniel. The request for such records as to Officer Daniel was therefore unsupported and properly denied by the trial court.

[11] The remedy for an erroneous denial of a *Pitchess* motion is under review by the Supreme Court. (*People v. Gaines*, review granted, November 28, 2007, S157008.)

C. Prosecutorial Misconduct

Defendant contends that the prosecutor committed prejudicial misconduct when, on redirect examination, he elicited testimony from Agent Sims that defendant was a suspect in a string of robberies. He argues that the misconduct was so egregious that it warranted an immediate mistrial and, therefore, that the trial court erred in denying his motion for mistrial.

Defendant's misconduct challenge is based upon the following questions by the prosecutor, answers by Agents Sims, and ruling by the trial court: "[Prosecutor]: Agent Sims, why don't [*sic*] you physically check the address any time after December 16, 2005? Why didn't you actually go out there? "[Agent Sims]: I had received information from law enforcement that [defendant] was a suspect in I believe, if I'm not mistaken, a string of robberies. [Defendant's Counsel]: What? I move for immediate mistrial. Where is this coming from? Oh Jesus. [The Court]: Overruled. [Defendant's Counsel]: Submit it. [¶] . . . [¶] [Prosecutor]: After December 16th why didn't you physically go out and check the residence? [Agent Sims]: He was placed in custody. I received information from law enforcement that he was a suspect."

Following Agent Sims's testimony, the following sidebar discussion took place: "[Defense Counsel]: Your Honor, we are going to have a ruling please, a ruling? [The Court]: On what? [Defense Counsel]: May we approach? [The Court]: Yes. [The Court]: What are you referring to, a ruling what? [Defense Counsel]: Your Honor, I made a motion for mistrial, Agent Sims completely -- [The Court]: I denied your motion for mistrial. [Defense Counsel]: Your Honor, what's the grounds? He brought in my client was being investigated for a string of robberies. I never brought – your Honor, don't say the defense opened the door, please. It was on a question by the People. [The Court]: Motion for mistrial denied. [Prosecutor]: Your Honor, [defense counsel] -- [The Court]: Come here. [Prosecutor]: Your Honor, if it may be appropriate, you can certainly tell the jury disregard [sic] any statements. [The Court]: We will do that. We will do that."

After the close of testimony, the trial court and counsel engaged in the following discussion: "[The Court]: We, at one point during the trial early in the trial when the first witness testified, Mr. Sims, at one point he made some statement that – in answer to a question at [*sic*] cross-examination, I believe. [Defense Counsel]: It was on redirect. [The Court]: Redirect. He made some statement that the defendant was a suspect on some robbery as far as he knew. And there was an objection made, and we had a sidebar conference. And in there there was a motion for a mistrial made, and I denied that motion. And I did indicate that at some point I would mention that to the jury that they would disregard that statement. I understand – and we've discussed this. [¶] Now, I understand, [defense counsel], you do not wish me to state anything regarding that? [Defense Counsel]: And I – just so the record is clear, I think the extreme prejudice was done at the time. The court – I'm not going to relitigate it – denied my motion for mistrial. I don't think that curing instruction is going to help. I think it will hurt [defendant] based on the stage we're in."

a. Forfeiture

The Attorney General contends that defendant forfeited his claim of prosecutorial misconduct by failing to make an immediate and specific objection on that ground and request a curative admonition. We agree.

"To preserve a claim of prosecutorial misconduct, a defendant must make a timely and specific objection. Failure to do so forfeits the issue for appeal. (*People v. Gray* (2005) 37 Cal.4th 168, 215 [33 Cal.Rptr.3d 451, 118 P.3d 496].) 'Because we do not expect the trial court to recognize and correct all possible or arguable misconduct on its own motion [citations], defendant bears the responsibility to seek an admonition if he believes the prosecutor has overstepped the bounds of proper comment, argument, or inquiry.' (*People v. Visciotti* (1992) 2 Cal.4th 1, 79 [5 Cal.Rptr.2d 495, 825 P.2d 388].)" (*People v. Wilson* (2008) 44 Cal.4th 758, 800.)

In this case, defendant's counsel immediately requested a mistrial after Agent Sims testified about defendant being a suspect in a series of robberies, but counsel did not

state an objection based specifically on misconduct and did not request an admonition. And, although defendant's trial counsel did renew his request for mistrial after Agent Sims finished testifying, he again did not make specific reference to prosecutorial misconduct or agree to the admonition proposed by the prosecutor and accepted by the trial court. In so proceeding, defendant's trial counsel deprived the trial court of the opportunity to cure timely any prejudice that may have resulted from the comment about defendant being a robbery suspect. Defendant therefore forfeited his claim of prosecutorial misconduct on appeal.

b. Prejudice

Even assuming that the prosecutor engaged in misconduct by eliciting the robbery suspect comment from Agent Sims, and that defendant did not forfeit his challenge based thereon, he is not entitled to the reversal of the judgment that he seeks unless he also shows that the misconduct resulted in prejudice. "Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. (*People v. Strickland* (1974) 11 Cal.3d 946, 955 [114 Cal.Rptr. 632, 523 P.2d 672].) Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action '"so infected the trial with unfairness as to make the resulting conviction a denial of due process."' (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [91 L.Ed.2d 144, 106 S.Ct. 2464] (*Wainwright*), quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [40 L.Ed.2d 431, 94 S.Ct. 1868].)" (*People v. Riggs* (2008) 44 Cal.4th 248, 298.)

In this case, there was strong evidence of guilt. There was no dispute that the officers recovered a handgun, brass knuckles, a substantial amount of drugs, and other

contraband from the mobile home. And there was no dispute that the mother of defendant's child and his child resided at the mobile home.

Thus, the crucial issue was whether defendant also resided at the mobile home. On that issue, the evidence was compelling. It was undisputed that defendant was on parole. It was also undisputed that five days prior to his arrest, defendant filled out and signed a form that unequivocally confirmed the mobile home was his new, permanent residence and that he lived there with his girlfriend and child. Based on that information, the officers conducted the surveillance and parole compliance check at that location on December 20, 2005. When they arrived, they saw defendant emerge from the mobile home along with the mother of his child, Sarah Mulligan. Mulligan admitted that she had moved defendant's clothes into the mobile home and both defendant and Mulligan admitted to Officer Jaramillo that the male clothing in the closet was defendant's, although each later denied making such statements. Defendant's DOC identification card was recovered from the mobile home, as were pictures of defendant, one of which pictured defendant with his child. In addition, Nazi writings and a confederate flag were found at the location and defendant, who had Nazi and confederate flag tattoos, admitted that he had, at least in the past, subscribed to the philosophies of Nazi Germany and white supremacy.

Although defendant and Mulligan, among others, testified that defendant did not live at the mobile home, defendant admitted that he was a former drug user and convicted felon on parole, and Mulligan admitted she was a former drug addict who had sought treatment for her addiction, including methadone treatment. Thus, their self-serving testimony about where defendant resided on December 20 was questionable, at best, particularly in light of the change of address form that defendant filled out just five days prior to his arrest.

Based on the evidence in the record, defendant cannot demonstrate the requisite prejudice for a reversal based on misconduct. It is not reasonably probable that he would have received a more favorable outcome if Agent Sims had not made the robbery suspect comment, and, in light of the evidence, the comment did not result in a trial so infected

with unfairness as to make his conviction a violation of due process. The trial court did not commit prejudicial error when it denied defendant's motion for mistrial based on the alleged misconduct.

D. Evidentiary Rulings

Defendant maintains that the trial court erred by allowing the jury to view photographs of defendant showing his Nazi tattoos. He argues that those photographs portrayed him as a racist to the jury and that the prejudicial and inflammatory character of those photographs outweighed any slight evidentiary value they may have had, resulting in an unfair trial. Defendant also contests the trial court's ruling excluding hearsay statements from Cipolla, purportedly made to Officer Jaramillo, showing that Officer Jaramillo knew of Cipolla's Nazi beliefs and may have found Nazi paraphernalia on Cipolla's person when he arrested Cipolla. Defendant argues that such evidence would have helped connect Cipolla to the mobile home and its contents, including the Nazi paraphernalia recovered there, and would have corroborated defendant's evidence that he did not reside there.

Defendant's evidentiary challenges are reviewed under an abuse of discretion standard of review. (*People v. Avila* (2006) 38 Cal.4th 491, 578 ["We review for abuse of discretion a trial court's rulings on relevance and the exclusion of evidence under Evidence Code section 352"].) "Under the abuse of discretion standard, 'a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113 [40 Cal.Rptr. 3d 118, 129 P.3d 321].)" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.)

a. Tattoo Evidence

Defendant moved to exclude the photographs showing his Nazi tattoos under Evidence Code section 352, arguing that they were more prejudicial than probative. The trial court denied the motion, finding that the tattoos had sufficient probative value on the issue of defendant's residence.

The photographs of defendant's Nazi tattoos, although inflammatory, had direct relevance to a critical element of the prosecution's case—defendant's dominion and control over the mobile home. The officers conducting the parole search of the mobile home recovered Nazi and white supremacist documents, a confederate flag, and a tool box with a confederate flag sticker. Defendant admitted that, at least in the past, he subscribed to Nazi and white supremacist beliefs The photographs of his tattoos, which were also found in the mobile home, directly connected defendant to the documents and flag found at the location. They were therefore relevant to determining whether defendant resided at the mobile home, and the trial court did not abuse its discretion by ruling that such relevance outweighed any prejudice that might flow from the racist nature of the evidence.

Defendant argues that the photographs were unnecessary because there was other, nonprejudicial evidence connecting defendant to the mobile home, including other photographs of him, his DOC identification card, and clothing that Mulligan admitted had been moved to that location. But under the applicable standard of review, it was within the trial court's discretion to weigh the necessity of the tattoo photographs in light of the other evidence, and it was not unreasonable for the court to conclude that the photographs were appropriate given that the residency issue was vigorously disputed by defendant and several other witnesses on his behalf. The ruling denying defendant's motion to exclude the photographs of his Nazi tattoos was, therefore, not arbitrary or capricious.

b. Exclusion of Third-Party Culpability Evidence

The trial court's exclusion of Cipolla's hearsay statements to Officer Jaramillo concerning Cipolla's Nazi and skinhead affiliations was not an abuse of discretion.

Defendant did not produce Cipolla in court or establish his unavailability. (Evid. Code, § 1230.) Nevertheless, defendant was allowed to call several witnesses, including himself, Sarah Mulligan, Janet Mulligan, and Angelina Prevedello, to testify that Cipolla had both Nazi and skinhead affiliations. Each testified consistently on that subject and the prosecution did not offer rebuttal evidence to contest the issue. Moreover, Sarah and Janet Mulligan testified that Sarah Mulligan was in an intimate relationship with Cipolla, who slept overnight at the mobile home and had clothing and other personal property there, including tattoo equipment. As a result, defendant was able to argue to the jury that Cipolla had Nazi and white supremacist affiliations and that the Nazi and white supremacist documents and materials found in the mobile home were therefore Cipolla's. In light of all the other evidence of Cipolla's Nazi and skinhead affiliations, it was not unreasonable for the trial court to exclude Cipolla's hearsay statements to Officer Jaramillo as not warranted, cumulative, and unnecessary. The exclusion of that evidence was not arbitrary or capricious and, in any event, was not prejudicial given the other direct, uncontroverted evidence of Cipolla's Nazi and skinhead affiliations.

Defendant asserts that the trial court precluded the defense from asking Officer Jaramillo about his awareness of whether Cipolla had beliefs regarding Nazi low-riders or similar matters. Such an opinion would have been reflected in a police report recounting Cipolla's statement. The trial court could properly exclude such evidence as not being based on personal knowledge.

Also, the trial court could properly sustain the objection to a defense question of Officer Jaramillo as to whether he found Nazi paraphernalia on Cipolla. The defense established no foundation for such an inquiry, and the evidence would have been cumulative in any event.

E. Sentencing Issues

a. Convictions on Greater and Lesser Included Offenses

Defendant challenges his convictions on Count 2 and Count 3—possession of morphine and possession of oxycodone in violation of Health and Safety Code section 11350, subdivision (a)—on the grounds that those charges are lesser offenses included within Count 4—possession of morphine and oxycodone with a firearm in violation of Health and Safety Code section 11370.1, subdivision (a)—on which he was also convicted. He contends that he cannot be convicted on both the greater and lesser included offenses and, therefore, his convictions on Counts 2 and 3 must be reversed.

The Attorney General agrees that Counts 2 and 3 are lesser offenses included within Count 4 and that defendant should not have been convicted of both the greater and lesser included offenses. He disagrees, however, with defendant's conclusion that Counts 2 and 3 must be reversed. According to the Attorney General, because the combined consecutive sentences on Counts 2 and 3 are longer than the sentence imposed on Count 4, Counts 2 and 3 should be affirmed and Count 4 dismissed. He bases this contention on the policy behind section 654 which favors punishment under the provision of law that provides for the longest potential term of imprisonment.

We agree with the parties that Health and Safety Code section 11350, subdivision (a) (simple possession, Counts 2 and 3) defines a lesser offense included within the offense defined in Health and Safety Code section 11370.1, subdivision (a) (possession with a firearm, Count 4). We also agree that defendant cannot be convicted of both a greater and lesser included offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227 ["A judicially created exception to the general rule permitting multiple conviction 'prohibits multiple convictions based on necessarily included offenses'"].) We disagree, however, with the Attorney General's conclusion that Counts 2 and 3 should be affirmed and the conviction on Count 4 dismissed.

It appears well-settled in California that when a defendant is convicted of both a greater and lesser included offense, the greater offense "'is controlling and the conviction

of the lesser offense must be reversed.'" (*People v. Pearson* (1986) 42 Cal.3d 351, 355.) In this case, the conviction on Count 4, possession of morphine and oxycodone with a firearm, is the greater offense and is controlling. Because Counts 2 and 3 are lesser offenses included within Count 4, the convictions on those offenses must be reversed and remanded to the trial court with instructions to dismiss those Counts.

As to the sentence imposed by the trial court on Count 4, it appears to be incorrect. The trial court imposed the middle term, which the trial court calculated as two years, doubled to four years pursuant to the Three Strikes Law. But the middle term sentence for a violation of Health and Safety Code section 11370.1, subdivision (a) is three years, not two years.[12] The trial court therefore should have imposed a three-year sentence on Count 4 doubled to six years pursuant to the Three Strikes Law, as opposed to the four-year sentence it imposed.

b. Custody Credit

The parties agree that defendant is entitled to three additional days of presentence custody credit and that this court has the power to direct that the abstract of judgment be amended to reflect those three additional days. Defendant was arrested on December 20, 2005, and sentenced on May 15, 2007. Pursuant to section 4019, subdivision (a)(1), both the date of his arrest and the date of his sentence should have been included in the presentence custody credit calculation, but apparently were not. If they are included in the calculation, defendant is entitled to 512 days of actual custody credit, as opposed to the 511 awarded by the trial court, and he is entitled to 256 days of conduct credit, as opposed to the 254 days awarded by the trial court, for a total of 768 days of custody credit, instead of the 765 days awarded by the trial court.

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12 See footnote 6, *ante*.

DISPOSITION

The judgments of conviction on Counts 2 and 3 are reversed, those charges are remanded to the trial court with instructions to dismiss them, and the sentence on Count 4 shall be increased to six years. The judgments of convictions on Counts 1, 4, 5, 6, and 7 are reversed for the limited purpose of remanding the case to the trial court for a determination of the proper scope of defendant's discovery request and an in camera inspection of Officer Jaramillo's personnel records to determine whether they contain information relevant to defendant's misconduct defense. If, after in camera review, the trial court determines there is no discoverable information in the relevant personnel records, the original judgments of conviction on Counts 1, 4, 5, 6, and 7, which we have otherwise affirmed, shall be reinstated, and the trial court shall resentence defendant in accordance with this opinion. If the trial court determines that there is discoverable material, it should be turned over to defendant so that he may determine if it would have led to any relevant, admissible evidence that could have been presented at trial. If defendant can demonstrate that he was prejudiced by the denial of discovery, the trial court shall order a new trial. If defendant cannot demonstrate any such prejudice, the original judgments of conviction on Counts 1, 4, 5, 6, and 7 shall be reinstated, and the trial court shall resentence defendant in accordance with this opinion.

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.